Playing the Sovereign Card

Defending Foreign Sovereigns in U.S. Courts

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The Foreign Sovereign Immunities Act (FSIA) turns 40 this year, presenting a fitting occasion to take stock of the perks and pitfalls of representing a foreign state in U.S. courts. This article provides an overview of the special rules that apply to foreign sovereigns at each step of the litigation process—from service of complaint to enforcement of judgment—and also discusses the unique challenges of representing a foreign state client.

When defending a foreign state, the first question to ask is whether your client was properly served. The FSIA's service provision, 28 U.S.C. § 1608, is the exclusive means for serving process on a foreign state, political subdivision, or state-owned instrumentality. *See* Fed. R. Civ. P. 4(j). Courts require strict adherence to the terms of section 1608, although they frequently will give plaintiffs another opportunity to effect service using the proper method. Actual notice is not sufficient.

If the defendant is a foreign state or its political subdivision, 28 U.S.C. § 1608(a) provides four methods of service, in descending order of preference. The plaintiffs must attempt the first method or determine that it is unavailable before proceeding to the second method, and so on. The first method for foreign states or political subdivisions is by "special arrangement" between the plaintiffs and foreign state. 28 U.S.C. § 1608(a)(1). Courts require a definite manifestation of agreement when determining that a special arrangement has been made, such as a contract provision specifying a method of service in the event of suit. Where there is no special arrangement, the plaintiffs must determine whether the defendant can be served via an international service convention, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. 28 U.S.C. § 1608(a)(2). If the defendant is not a party to such a convention, service may be made by having the clerk of the court send a copy of the summons and complaint, along with a translation in the official language of the foreign state, to the head of the ministry of foreign affairs by a form of mail requiring a signed receipt. 28 U.S.C. § 1608(a)(3). Here, plaintiffs often go wrong by serving the foreign state's embassy in the United States or by serving someone other than the head of the ministry of foreign affairs. Only after 30 days, if that method also fails, can plaintiffs seek service through diplomatic channels. Plaintiffs must jump through a number of hoops to serve via diplomatic channels. These steps are set out in 28 U.S.C. § 1608(a)(4). The State Department's website also provides a 12-item "FSIA checklist" that plaintiffs should follow before submitting a request for diplomatic service.

There is a separate set of rules provided for service on an agency or instrumentality of a foreign state. These are set out in section 1608(b) and provide three means of service, in descending order of preference. Notably, the service by diplomatic channels option is not available for agencies or instrumentalities.

If your foreign state client is served in state court, 28 U.S.C.

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§ 1441(d) provides a right to have the case removed to the federal district court "for the district and division embracing the place where such action is pending."

The next line of defense when representing foreign states is subject matter jurisdiction. Under 28 U.S.C. § 1330, the federal district courts have jurisdiction over nonjury civil actions against a foreign state only if one of the FSIA exceptions to immunity applies. Foreign states are presumptively immune; unless the plaintiff can establish that one of the exceptions to immunity applies, the U.S. court has no subject matter jurisdiction.

Because sovereign immunity goes to the court's subject matter jurisdiction, it can be raised at any time, even on appeal and even as late as when the plaintiff seeks to enforce a judgment. If the foreign state does not appear and assert the defense, the district court must determine, among other things, that an exception to sovereign immunity applies before it can enter a default judgment. Note, however, that if a foreign state appears and files an answer that does not raise sovereign immunity as a defense, some courts will treat the defense as having been waived.

When filing a motion to dismiss for lack of subject matter jurisdiction, the foreign state can make a facial or factual attack on the complaint. In a facial attack, the foreign state challenges subject matter jurisdiction based on the allegations in the complaint, and the district court takes the allegations as true in deciding whether to grant the motion. In a factual attack, the foreign state introduces evidence as exhibits to the motion to dismiss, which support its position that no exception to immunity applies. When examining a factual attack, the court does not treat the allegations in the complaint as true but instead weighs evidence to confirm the existence of the factual predicates for subject matter jurisdiction.

Unlike other defendants, foreign states cannot move to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). By statute, 28 U.S.C. § 1330(b), personal jurisdiction can be exercised over a foreign state (including its departments, political subdivisions, agencies, and instrumentalities) so long as the foreign state has been properly served under the FSIA service provision and an exception to immunity exists. In other words, subject matter jurisdiction plus service results in personal jurisdiction. Some courts of appeals have held that foreign states are not "persons" who can invoke Fifth Amendment due process limits on the exercise of personal jurisdiction. Because state-owned instrumentalities are presumed to be legally separate entities from the foreign state, they do enjoy due process rights, which means that the plaintiff must establish that the instrumentality has sufficient minimum contacts with the United States. *See GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805 (D.C. Cir. 2012).

In determining whether the FSIA applies to your client, a threshold question is whether your client falls within the definition of "foreign state" in section 1603 of the FSIA, which defines "foreign state" broadly to encompass not just the sovereign nation but also its political subdivisions and its agencies or instrumentalities. The FSIA further defines which agencies and instrumentalities will be treated as the "foreign state" for the purpose of determining immunity. The most important requirements are that the agency or instrumentality must be a separate legal person "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2).

Determining FSIA Coverage

The question of which agencies and instrumentalities are covered by the FSIA has spawned significant litigation. In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the Supreme Court resolved one recurring issue when it held that only the top tier corporation directly owned by the foreign government is protected by the FSIA; the government-owned corporation's subsidiaries are not.

Another important limitation on the scope of the FSIA is that the FSIA does not confer immunity in lawsuits against foreign officials. In *Samantar v. Yousuf*, 560 U.S. 305 (2010), the Supreme Court held that official immunity is a creature of common law. The FSIA also does not address diplomatic and consular immunities, which are governed by treaty.

In determining whether a foreign state enjoys sovereign immunity, courts often looked to the definition of "foreign state" in section 201 of the *Restatement (Third) of the Foreign Relations Law of the United States*. That definition does not require U.S. recognition of the foreign state, although courts also treated recognition as an important consideration. Recently, the Supreme Court held in *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015), that the power to recognize foreign states, including for purposes of determining sovereign immunity, rests with the executive branch.

If you have established that your client has been properly served and falls within the FSIA's definition of "foreign state," your next task is to determine whether an exception to immunity applies. Section 1605 of the FSIA creates six general exceptions to immunity, and section 1605A creates a terrorism exception that applies only if the foreign state is one of a handful of states designated as state sponsors of terrorism. The general exceptions apply to cases involving (1) the foreign state's waiver of immunity; (2) commercial activities occurring in the United States or causing a direct effect in this country; (3) property expropriated in violation of international law; (4) inherited, gifted, or immovable property located in the United States; (5) noncommercial torts occurring in the United States; and (6) maritime liens. The

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waiver, commercial activities, and tort exceptions are the most commonly litigated.

The waiver exception. Although waivers can occur "explicitly or by implication," courts are reluctant to find an implicit waiver. In the legislative history to the FSIA, Congress identified three types of implicit waivers: (1) agreement to arbitration in another country, (2) agreement that a contract is governed by the law of a particular country, or (3) filing a responsive pleading without raising the defense of sovereign immunity. As to the third type of implicit waiver, the filing of a motion to dismiss that does not raise sovereign immunity is not treated as a waiver because motions to dismiss are not responsive pleadings. *See* Fed. R. Civ. P. 7(a). Some plaintiffs have argued that a foreign state implicitly waives its sovereign immunity if it engages in substantial human rights violations, such as genocide, war crimes, or torture, but the courts consistently have rejected these arguments.

Where there is an explicit waiver, it is important to consider whether your client is the one that waived. For example, if the foreign state waived, but the defendant is a state-owned instrumentality, the defendant state-owned instrumentality should not be treated as having waived. State-owned instrumentalities are entitled to a presumption of separateness.

The commercial activities exception. Under the commercial activities exception, a foreign state is not immune in an action "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Whether a commercial activity had a "direct effect" in the United States is a recurring issue in FSIA litigation, with courts taking a range of approaches on the nexus they require between the United States and the commercial activity. The Supreme Court has rejected a requirement of foreseeability or substantiality.

The FSIA unhelpfully defines "commercial activity" to mean "[e]ither a regular course of commercial conduct or a particular commercial transaction or act," leaving the term "commercial" undefined. 28 U.S.C. § 1603(d). The FSIA provides the added gloss that the commercial character of an activity is determined "by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." This distinction between the nature versus purpose of the activity was the subject of the Supreme Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). There, the Supreme Court held that Argentina's issuance of bonds to service sovereign debt, though having a sovereign purpose, fell within the commercial activity exception, because the nature of the activity at issue—issuance of debt instruments—was one in which private parties engage. As the Court explained, "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.* at 614–15. Of course, distinguishing the "nature" versus the "purpose" of the activity is no easy task, and it continues to be a source of litigation.

The commercial activities exception also was the subject of the Supreme Court's recent decision in *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015). There, the Court held that a California resident could not sue Austria's state-owned railroad for injuries she suffered in Austria simply because she purchased her Eurail train pass online while in the United States from a U.S.-based travel agent. The statute requires that the action be "based upon" the U.S. commercial activities. In *Sachs*, the Court held that it is not enough for the U.S.-based activities to form one element of the plaintiff's cause of action. Instead, the test is where the conduct constituting the "core" or "gravamen" of the suit occurred, which, in *Sachs*, was Austria, not the United States.

In contrast to jurisdictional discovery, post-judgment discovery is broad in scope even for foreign sovereigns.

The noncommercial torts exception. This exception applies where money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or omission of that foreign state or of an official or employee acting within the scope of his office or employment. The exception excludes claims based on exercise of a discretionary function and certain torts (malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights). 28 U.S.C. § 1605 (a)(5). Lawsuits brought under this exception range from those arising from a fall at the Republic of Singapore's embassy in the United States to a suit against China for the murder of an American citizen in California allegedly upon orders of the director of China's Defense Intelligence Bureau.

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When a suit goes forward under the noncommercial torts exception, the district court will apply the law of the forum state, including its choice-of-law rules. (The Ninth Circuit, however, applies the federal choice-of-law rule.) By statute, 28 U.S.C. § 1606, the plaintiff may not recover punitive damages against a foreign state, although such damages are available against an agency or instrumentality.

If the district court determines that one of the exceptions to immunity applies, its denial of immunity is immediately appealable under the collateral order doctrine.

Discovery

Jurisdictional discovery. The FSIA protects foreign states not just from liability but also from discovery and other burdens of litigation. Courts are thus reluctant to routinely allow jurisdictional discovery. Jurisdictional discovery generally is allowed only to confirm specific facts crucial to the immunity determination. For example, a plaintiff who conclusorily pleads that the commercial activity exception applies is unlikely to be allowed to conduct jurisdictional discovery. Occasionally, the parties can agree to the nature and extent of the factual discovery that will be conducted. *See, e.g.*, *Kilburn v. Soc. People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004) (noting that "parties agreed to limited jurisdictional discovery" consisting of plaintiff providing defendants with certain U.S. government documents and a declaration from a retired U.S. ambassador). Whether by agreement of the parties or otherwise, however, the trial court retains "considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). In doing so, courts often defer and stage discovery in the preliminary stages of an FSIA lawsuit to address the particular issues under consideration. *See, e.g.*, *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 29 (D.D.C. 2005).

Pretrial discovery. If a foreign defendant lacks sovereign immunity and continues to participate as a party in the litigation rather than defaulting, discovery proceeds in the same manner as other cases before the court. *See* H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621–22 (noting that Congress did not include discovery procedures in the FSIA because existing law adequately dealt with the issue). Given the likelihood of documents and witnesses located outside the United States in such cases, discovery may include the use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or attempts to use Rule 45 subpoenas to compel production in the United States of documents and testimony located abroad. Such discovery can often be protracted and demanding, with a significant risk of discovery sanctions being imposed. *See* H.R. Rep. No. 94-1487, at 23 (noting that, in the event of an unjustifiable failure to respond to discovery in an FSIA action, "appropriate remedies would be available under [Rule 37]").

In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), the Supreme Court held the Hague Evidence Convention does not provide the exclusive means of obtaining discovery abroad, nor must parties first resort to Hague discovery before invoking the discovery mechanisms provided by the Federal Rules of Civil Procedure. The Court, however, identified five factors that courts should consider in deciding whether to limit foreign discovery against foreign litigants: (1) the importance to the litigation of the documents or other information requested, (2) the degree of specificity of the request, (3) whether the information originated in the United States, (4) the availability of alternative means of securing the information, and (5) the extent to which noncompliance with the request would undermine important interests of the United States or compliance with the request would undermine important interests of the state where the information is located. Where the foreign litigant is a foreign sovereign, courts are likely, as a matter of international comity, to undertake a searching analysis of the *Aerospatiale* factors.

Enforcement discovery. In contrast to jurisdictional discovery, post-judgment discovery is broad in scope even for foreign sovereigns. In 2014, the Supreme Court held that the FSIA does not limit a plaintiff's ability to conduct post-judgment execution discovery on a foreign state's assets, even if those assets are located outside the United States and even if the assets are of a type immune from execution. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014).

Grounds for Dismissal

If the foreign state is not immune under the FSIA, it should consider seeking dismissal by invoking abstention doctrines—such as the act of state or political question doctrines—or defenses such as forum non conveniens or exhaustion of local remedies.

The act of state doctrine. The act of state doctrine is a judicially fashioned principle that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 439 (1964) (precluding American courts from inquiring into validity of Cuban expropriation decree); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (shielding Venezuelan military commander from tort liability for detaining American citizen during Venezuelan revolution). The underlying policy is to "foreclos[e] court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Alfred Dunhill of London, Inc. v. Republic of*

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Cuba, 425 U.S. 682, 697 (1976). In effect, "the act of state doctrine operates as a super-choice-of-law rule, requiring that foreign law be applied in certain circumstances." *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1114 (5th Cir. 1985).

To successfully invoke the doctrine, a defendant (or foreign state or a private litigant) must establish that the act meets two requirements: (1) the act is a "public act," such as a constitutional amendment, statute, regulation, or official proclamation; and (2) the act was completed within the sovereign's territory. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). In a recent case, a federal district court dismissed, on act of state grounds, common-law tort claims asserted against a U.S.-based private company providing registry services for the maritime administrator of the Republic of the Marshall Islands. *See AdvanFort Co. v. Int'l Reg., Inc.*, C.A. No. 15-220, 2015 BL 222973, slip op. at 12 (E.D. Va. July 13, 2015); *AdvanFort Co. v. Cartner*, C.A. 15-220, slip op. at 10–16 (E.D. Va. Nov. 2, 2015). In doing so, the court reasoned that the act at issue (the suspension of a private security firm from working on Marshall Islands–flagged ships) was "governmental because a private party, acting alone, without the authority of the Marshall Islands, could not issue or deny a permit to a private company that would allow it to provide security services on Marshall Islands ships." *Id.* at 13.

The political question doctrine. Like the act of state doctrine, the political question doctrine is a principle of non-justiciability, not a jurisdictional prohibition. It precludes a court from adjudicating lawsuits that "involve resolution of questions committed by the text of the Constitution to a coordinate political branch of Government," that would require a court to "move beyond areas of judicial expertise," and in which "prudential considerations counsel against judicial intervention." *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring). A multifactor test is used for determining whether a lawsuit presents a political question that courts should not attempt to resolve, including whether there is "a lack of judicially discoverable and manageable standards for resolving" the issue presented. *Baker v. Carr*, 369 U.S. 186, 217 (1962). In weighing the *Baker v. Carr* factors, courts occasionally request the position of the U.S. government on the issues presented. *See, e.g., Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 388 (2d Cir. 2011). The situations in which credible political question arguments could be made in lawsuits against sovereign states are numerous and varied.

Forum non conveniens. The doctrine of forum non conveniens permits a court to decline jurisdiction that it is otherwise constitutionally or statutorily permitted to exercise. Through the doctrine's long history, courts have avoided attempts to "catalogue the circumstances which will justify or require either grant or denial of remedy." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). It is a discretionary doctrine that involves a balancing of factors, such as the relative ease of access to sources of proof; various witness issues; the ease, cost, and fairness of trial; and the enforceability of any resulting judgment—"unless the balance [of these factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

For cases premised on the terrorism exception to the FSIA and in which the court has the requisite jurisdiction, including personal jurisdiction over the defendants, the chances of a dismissal on forum non conveniens grounds is highly remote. However, where issues relating to the enforceability of judgments and arbitral awards exist, the possibility of a dismissal on such grounds is higher. *See, e.g., Figueiredo Ferraz e Engenharia de Projeto Ltda.*, 665 F.3d 384 (2d Cir. 2011).

Exhaustion of local remedies. A less frequent basis for dismissal than the act of state, political question, and forum non conveniens doctrines is the requirement to exhaust local remedies. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). A defendant asserting the defense of failure to exhaust local remedies bears the initial and ultimate burden of demonstrating the existence and practical availability of the local remedies, and a plaintiff may overcome that showing by demonstrating the futility of such remedies. *Sarei v. Rio Tinto*, 550 F.3d 822, 832 (9th Cir. 2008).

In the event of a default by a foreign nation, a plaintiff who "establishes his claim or right to relief by evidence satisfactory to the court" is entitled to the entry of a default judgment under the FSIA. 28 U.S.C. § 1608(e). This is the same standard for entry of a default judgment against the United States under Rule 55(e) of the Federal Rules of Civil Procedure. The plaintiff enjoys various procedural advantages in the default context. For example, all uncontroverted evidence is accepted as true. *Estate of Buonocore v. Great Socialist People's Libyan Arab Jamahiriya*, C.A. Nos. 06-727, 08-529, 2013 U.S. Dist. LEXIS 11564 (D.D.C. Jan. 29, 2013) (Facciola, Mag. J.). In addition, supporting evidence "may take the form of sworn affidavits or prior transcripts," and may also include judicial notice of findings and conclusions of related proceedings. *Estate of Botvin v. Islamic Republic of Iran*, 510 F. Supp. 2d 101, 103 (D.D.C. 2007).

The process of entering a default judgment under the FSIA is not a mere formality, and it can be very extensive and time-consuming for the court. A good summary of the steps courts must go through before entering a default judgment under the FSIA and when ruling on motions to vacate such judgments is the recent memorandum opinion issued by Judge John D. Bates in *Owens v. Republic of Sudan*, C.A. No. 01-2244-JDB, 2016 U.S. Dist. LEXIS 37464 (D.D.C. Mar. 23, 2016).

Judgment Enforcement

A significant amount of litigation under the FSIA involves proceedings to enforce judgments against foreign states, which

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often are default judgments resulting from allegations of state-sponsored terrorism. Frequently the subjects of those enforcement proceedings are instrumentalities that are not, by name, the foreign nation itself and assets that are not directly titled in the name of the foreign state.

The FSIA does not contain its own judgment enforcement procedures; rather, Federal Rule of Civil Procedure 69(e) and, by reference, enforcement procedures under state law, generally govern execution and attachment proceedings. When the subject of an attachment is an asset of a foreign state, section 1609 of the FSIA confers immunity, subject to any applicable treaty obligations. The key issue in such situations is whether an exception to immunity exists under section 1610(a), which applies to "[t]he property in the Unites States of a foreign state." Efforts to enforce judgments against foreign states can reach unusual lengths, such as when judgment creditors who had obtained a $10 million default judgment against the People's Republic of China attempted to "execute the judgment upon two Chinese giant pandas on loan to the National Zoo in Washington, D.C." *Walters v. Indus. & Commer. Bank of China, Ltd.*, 651 F.3d 280, 284 (2d Cir. 2011).

The willingness of Congress to step into the middle of collection disputes enhances the legal risks that foreign states face.

Foreign states that are experienced with the FSIA have become very cautious about placing assets within the reach of U.S. courts. Frequently, therefore, the subject of attachment and enforcement proceedings are assets held in the hands of persons or entities alleged to be "agencies" or "instrumentalities" of such foreign states within the meaning of section 1610(b) of the FSIA.

The controlling case for when an instrumentality or agency of a sovereign state becomes the "alter ego" of a foreign sovereign state is *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), known as "*Bancec*." In *Bancec*, the Supreme Court created a presumption that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." According to the Court, "[f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee." The Supreme Court drew support for this proposition in the legislative history of 28 U.S.C. § 1610(b). *Bancec*, 462 U.S. at 627–28 (quoting H.R. Rep. No. 94-1487, at 29–30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6628–29).

The *Bancec* presumption of separateness may be rebutted by evidence establishing an alter-ego relationship between the instrumentality and the sovereign state that created it. Specifically, the presumption may be overcome and an alter-ego relationship established if (1) the instrumentality "is so extensively controlled by its owner that a relationship of principal and agent is created," or (2) the recognition of an instrumentality's separate legal status would work a "fraud or injustice."

A significant recent decision involving the judgment enforcement provisions of the FSIA is *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), which involved an attempt by judgment creditors who had obtained a default judgment against the Islamic Republic of Iran to execute on $2 billion in bond assets in New York bank accounts that were owned indirectly by the Central Bank of Iran through intermediary financial institutions based in Luxembourg and Italy. In upholding a Second Circuit decision permitting the attachment of the assets, a majority of the Supreme Court enforced essentially case-dispositive legislation passed by Congress during the pendency of the case. A passionate dissent by Chief Justice Roberts challenged the majority's decision on separation-of-powers grounds. The willingness, and now apparent right, of Congress to step into the middle of collection disputes under the FSIA enhances the legal risks that foreign states and their instrumentalities or agencies face.

On September 28, 2016, the Justice Against Sponsors of Terrorism Act (JASTA) became law when Congress voted to override President Obama's veto of the legislation. JASTA amended the FSIA to deprive a foreign state of immunity in cases alleging foreign state involvement in an act of international terrorism that occurs in the United States. The legislation is targeted at Saudi Arabia's alleged role in 9/11. Critics of JASTA question whether it is consistent with international law and whether it opens the United States to analogous suits in other countries. Following intense criticism of the veto override, the speaker of the House and Senate majority leader already are discussing amending the legislation to address its unintended consequences.

Over its 40 years, the FSIA has evolved into a significant, complex statutory scheme for adjudicating claims against foreign states in U.S. courts. In an increasingly interrelated global legal and financial system, foreign governments and their agencies and instrumentalities face renewed legal risks that require careful and proactive planning. ■

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